Supreme Court, U. S.
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No. 97-1245

In The

Supreme Court of the United States

October Term, 1997

FREDRICK D. MERRILL,

Petitioner,

v.

STATE BAR OF ARIZONA, an instrumentality of the Arizona Supreme Court,

Respondent.

On Petition For A Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION

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February 24, 1998

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QUESTION PRESENTED FOR REVIEW

The Supreme Court of Arizona suspended Petitioner for violating Rule 63, Ariz. R.S.Ct. Therefore does the matter before the Court even involve the unauthorized practice of law?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent, State Bar of Arizona, is a non-profit corporation, incorporated in the State of Arizona.

TABLE OF CONTENTS

Page

OPINION BELOW 1

RULES INVOLVED 1

STATEMENT 3

REASONS FOR DENYING THE PETITION 4

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES:

In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985) ... 4

Middlesex County Ethics Committee v. Garden State Bar Association, et al., 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) 4

State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *modified on other grounds*, 91 Ariz. 293, 371 P.2d 1020 (1962) 6

RULES:

Arizona Supreme Court Rule 63 ..... 1, 4, 5

Arizona Supreme Court Rule 31(a)(3) 6, 7

OPINION BELOW

The Petition for Writ of Certiorari accurately reflects the opinions delivered in this case by other tribunals. The report of the Disciplinary Commission is included in the Appendix at 1a-15a.

RULES INVOLVED

Rule 63, Ariz. R.S.Ct. provides in part:

(a) Recipients of Notice; Contents. Within ten days after the date of the commission or court order or judgment imposing discipline or transfer to disability inactive status, or the date of resignation, a respondent suspended, disbarred, transferred to disability inactive status, or who has resigned, shall notify or cause the following persons to be notified by registered or certified mail, return receipt requested, of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same:

1. All clients being represented in pending matters; and

2. Any co-counsel in pending matters, and

3. Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties; and

4. Each court and division in which respondent has any pending matter, whether active or inactive.

The notice to be given to opposing counsel or parties shall state the place of residence of the client of respondent. In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension, transfer or resignation, it shall be the responsibility of the disbarred, suspended, transferred or resigned lawyer to move in the court or agency in which the proceeding is pending for leave to withdraw.

(b) Return of Client Property. Respondent shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. Respondent shall deliver all files and records in pending matters to the client, notwithstanding any claim of an attorney lien.

(c) Effective Date of Order: Winding Up Affairs. Judgments imposing suspension or disbarment shall be effective thirty days after entry, unless the court specifies an earlier date. Judgments and orders imposing other sanctions or transfer to disability inactive status are effective immediately upon entry. Respondent, after entry of a judgment of disbarment or suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter on any nature. During the period between entry and the effective date respondent may wind up and complete on behalf of any client all matters that were pending on the entry date. Respondent shall

refund any part of any fees paid in advance, which have not been earned.

STATEMENT

The State Bar hereby incorporates the facts recited in the Report of the Disciplinary Commission as set forth in the appendix at 2a-6a.

With regard to Petitioner's Statement, the State Bar disputes certain of the factual recitations as incomplete or inaccurate. Specifically, while Petitioner may have complied with the order suspending him (Petition at 3), he did not comply with Rule 63, Ariz. R.S.Ct., which governs the conduct of lawyers who have been suspended or disbarred. During Petitioner's period of suspension, there were no substitutions of counsel in his cases and he did not move to withdraw from those cases. Neither did Petitioner return client files, records, or property to clients; he retained those files and records at his office and retained unearned fees in his trust and general operating accounts. In addition, he accepted new clients during this same period. The Disciplinary Commission found that all of the above referenced conduct violated Rule 63, Ariz. R.S.Ct.

Petitioner also misstates the record in stating that after he was reinstated from his prior suspension, he was again charged by the "bar's disciplinary committee" with practicing law during his three-month suspension. Petition at 4. First, the Office of Bar Counsel, not a "disciplinary committee", filed the charging document or complaint. Second, and more important, while the

unauthorized practice of law was an element of the complaint it was not the only element. Petitioner was also charged with violating Rule 63. Appendix at 16a-20a.

Petitioner also misstates the record by asserting that the State Bar had to amend its complaint to allege a violation of Rule 63, Ariz. R.S.Ct. Petition at 5. The complaint consisted of four separate counts. Counts One and Three alleged violations of Rule 63. Only Count Two had to be amended during the hearing. Contrary to Petitioner's assertions, the disciplinary proceeding was not initiated solely because of his "allegedly unauthorized practice of law."

Finally, Petitioner incorrectly states that rule 63 prohibited a suspended lawyer from practicing law. Petition at 6. In point of fact, the rule contains no language, which specifically addresses the practice of law.

REASONS FOR DENYING THE PETITION

It has long been held in Arizona that the "purpose of discipline is to protect the public, the profession and the justice system." *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). The United States Supreme Court has also noted that the states have a strong interest in "assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex County Ethics Committee v. Garden State Bar Association et al.*, 457 U.S. 423, 435, 102 S.Ct. 2515, 2522, 73 L.Ed. 2d 116 (1982). Thus even accepting Petitioner's argument that he was denied equal protection, the state had a rational basis for doing so.

Petitioner asserts that he was denied equal protection of the law because he was suspended for engaging in the unauthorized practice of law. Petition at 8-9. Petitioner's entire premise is faulty because he was not suspended for practicing law while under suspension. In fact the Disciplinary Commission specifically did not find a violation of the rules relating to the unauthorized practice of law. Appendix at 13a. Rather, the Disciplinary Commission held that Petitioner repeatedly violated Rule 63, Ariz. R.S.Ct.

Specifically, the Disciplinary Commission found that Petitioner, during his suspension failed to file substitutions of counsel and that he did not move to withdraw from his cases. The Disciplinary Commission further found that he did not return client files, records, or property to clients and that he retained those files and records at his office and retained unearned fees in his trust and general operating accounts. While all of the aforementioned conduct violated Rule 63, none of it constituted the unauthorized practice of law.

The only violative conduct engaged in by the Petitioner that arguably could constitute the unauthorized practice of law was his acceptance of new clients during his period of suspension. This conduct expressly violated Rule 63(c), Ariz. R.S.Ct. The Disciplinary Commission however did not find a violation of the rules relating to the unauthorized practice of law.

Even assuming *arguendo* that Petitioner was sanctioned for engaging in the unauthorized practice of law,

his arguments are flawed. Petitioner presumes that simply because Arizona does not have an unauthorized practice of law statute, all citizens are allowed to engage in the unauthorized practice of law. Petitioner however has failed to cite to this Court, Rule 31(a)(3), Ariz. R.S.Ct. This rule states that:

> Except as hereinafter provided in subsection 4 of this section (a), no person shall practice law in this state unless he is an active member of the State Bar, and no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended, disbarred, or on disability inactive status.

In Arizona, the practice of law is defined by the Supreme Court of Arizona's holding in *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), *modified on other grounds*, 91 Ariz. 293, 371 P.2d 1020 (1962). The court held that:

> [T]hose acts, whether performed in court or in the law office, which lawyers have carried on from day to day through the centuries constitute the practice of law. Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect alter or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities, the preparation for another of matters for courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer. They also include rendering to another any other advice or services which are and have been customarily given and performed from day

> to day in the ordinary practice of members of the legal profession, either with or without compensation.

Id. at 95.

It appears that Petitioner would have this Court believe that Arizona is the land of the wild west, where anybody can hold themselves out as a lawyer and engage in the practice of law. As previously stated, just because there is no state statute relating to the unauthorized practice of law, does not mean that the common citizens of Arizona can engage in the practice of law. Petitioner has provided absolutely no support for his assertion that he was sanctioned for something that non-lawyers can do. In addition he has failed to take into account rule 31(a)(3), Ariz. R.S.Ct.

CONCLUSION

For all the foregoing reasons, the State Bar of Arizona respectfully urges the Court to deny the petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

In the Matter of **FREDERICK D. MERRILL,** Attorney No. 005916 a Member of the State Bar of Arizona, RESPONDENT.	Comm. Nos. 94-1394, 95-0235 & 95-0370 **DISCIPLINARY COMMISSION REPORT**

(Filed Feb. 13, 1997)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on December 14, 1996, for oral argument on the Hearing Committee's recommendation of suspension and probationary terms, pursuant to Rule 53(d), Ariz.R.S.Ct. The respondent, Fredrick D. Merrill ("Merrill"), filed an objection to the Hearing Committee's recommendation.

Decision

With five members concurring and three members dissenting,[1] the Commission adopts the findings of fact, conclusions of law, and recommendation of the Hearing Committee that:

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[1] Commissioner Ortega did not participate in these proceedings. Commissioners Malm, Bonwell, and Potts dissent, in the belief that a shorter suspension is warranted.

1. Merrill shall be suspended for a period of one year;

2. Not later than ten days prior to the effective date of the suspension, the director of the Law Office Management Assistance Program ("LOMAP") or her designee shall personally meet with Merrill to ensure that he has complied, will comply, and has put in place procedures to ensure his compliance with Supreme Court Rule 63 in all respects. If he has not, the State Bar shall consider appointment of a conservator under Supreme Court rule 65(a):

3. If Merrill applies for reinstatement, the same person or another designated by the director of LOMAP shall review Merrill's activities and actions during the period of suspension to determine whether Merrill complied with Rule 63, and shall file a report with the State Bar to be considered along with the other matters required by Supreme Court Rules 71 and 72; and

4. Any and all costs associated with these recommendations shall be borne by Merrill.

Facts

Merrill was admitted to the State Bar of Arizona on October 13, 1979. He was suspended from the practice of law for a period of ninety days by court order dated May 24, 1994. That suspension became effective on June 24, 1994.

Prior to his suspension, Merrill was a sole practitioner at "The Law Office of Fredrick D. Merrill." While suspended, Merrill continued to maintain his office,

receive mail, and occasionally meet with clients. He signed no pleadings and filled all of his time at paralegal rates.

He contracted with two lawyers to perform services for his clients during his suspension; Tara Brigham, a newly-admitted lawyer, and David Kennedy, an experienced practitioner. Merrill paid them by the hour to meet with clients, sign pleadings, and make court appearances. They did not work out of Merrill's office, and had no supervisory responsibilities over his staff, which consisted of three non-lawyers. Pleadings were prepared by Merrill's employees and submitted to Ms. Brigham and Mr. Kennedy for review and signature. The pleadings were on the letterhead of "Fredrick D. Merrill, P.C.," and Ms. Brigham's and Mr. Kennedy's signature followed the work "by."

The complaint in this matter arises out of his office's involvement in three cases during his period of suspension.

Count One involves Merrill continuing to act in a limited role for a client following his suspension. Shortly before Merrill's suspension began, his client, Jack King, confessed to him that he had been involved in a $400,000 check-kiting scheme involving First Interstate Bank of Arizona. Mr. King wanted Merrill to contact First Interstate to arrange an agreement that would preclude criminal prosecution.

Merrill contacted Dan Durrant, a lawyer he knew at the firm that served as outside counsel for First Interstate. Mr. Durrant was aware that Merrill was suspended. During their meeting, held on June 24, 1996, Mr. Durrant

called in James LeValley of First Interstate's legal staff. Mr. Durrant and Merrill differ in their recollection of whether Merrill told Mr. LeValley at that time that he was suspended; Merrill believes he did not mention that fact, while Mr. Durrant strongly believes he did.

Mr. LeValley referred the matter to Dan Bergin, another of the bank's legal staff. Mr. Bergin has testified that when he was brought into the case, he was given to understand that Merrill was Mr. King's attorney. Upon learning the amount of money involved, however, Mr. Bergin handed the matter over to First Interstate's other outside counsel, James Ball.

Mr. Ball testified that when he was initially contacted about the situation he was unaware of Merrill's suspension. When Mr. Ball became aware of Merrill's suspension a few days later, he expressed his discomfort with the appearance that he was facilitating Merrill's unauthorized practice of law. Mr. Ball did concede that he dealt directly with Mr. King, rather than Merrill, at their meeting, and that, although he was present, Merrill did not actively participate.

Mr. Ball eventually discovered he had a conflict of interest in the matter, and the case was referred to new counsel, who brought the matter to a satisfactory resolution.

Count Two of the complaint concerns the retention of a new client by Merrill's office while he was suspended.

In 1992, Merrill had hired Robert Silvert as a paralegal. Mr. Silvert had three years of law school and work experience in the legal field. When hired, Mr. Silvert was

in the middle of seven years' probation as a result of a 1990 conviction of one felony count of fraudulent schemes. Merrill initially supervised Mr. Silvert closely, but later relaxed that supervision. He testified that he never gave him full case responsibility for any matter.

On June 4, 1994, Jerry Klock was arrested in Arizona on a fugitive from justice warrant from the State of Nevada on an underlying drug charge. He contacted Merrill's office to resolve the matter, upon a referral by a bail bondsman friend of Mr. Silvert. Mr. Silvert handled the initial meeting with Mr. Klock and accepted his retainer. Mr. Klock never met Merrill.

Mr. Silvert telephones Scott Mitchell, an assistant district attorney in Clark County, Nevada, and informed him he was from the law office of Fred Merrill. He did not identify himself as either a paralegal or a lawyer. Mr. Mitchell assumed Mr. Silvert was a lawyer and described the plea agreement he would accept.

Mr. Silvert then contacted Robert Pancoast, a Las Vegas lawyer, to represent Mr. Klock at the Nevada hearing. Again, Mr. Silvert identified himself only as "Robert Silvert of the law office of Fred Merrill." After discussing his fee, Mr. Pancoast agreed to the representation, and the matter was resolved as Mr. Mitchell had agreed.

Both Mr. Mitchell and Mr. Pancoast testified that they assumed that Mr. Silvert was a lawyer, and that they would not have said or done what they did had they known he was not a licensed attorney.

Both Merrill and Mr. Kennedy testified that they had admonished Mr. Silvert on numerous occasions about

identifying himself as a paralegal, although neither did so in connection with the Klock matter.

Count Three also concerns the retention of a new client by Merrill's office while he was suspended.

Prior to Merrill's suspension, Peter Marella had contacted Mr. Silvert for representation in a DUI matter. Mr. Silvert met with Mr. Marella and his wife in July 1994 and accepted a retainer of $1,000 to $1,500 on behalf of Merrill's firm. Both Mr. Kennedy and Ms. Brigham became involved in representation of Mr. Marella, with Mr. Kennedy filing a notice of appearance in the case on Merrill's letterhead pleading paper. Although he does not specifically recall the case, Mr. Kennedy assumes he met with the client. After he was reinstated, Merrill became involved in the representation.

The Marellas claim they were never informed of Merrill's suspension, and no other witness could specifically recall whether the Marellas were sent a letter or otherwise informed of the suspension.

The Hearing Committee found that the remaining allegations in the Marella matter rest on the credibility of various witnesses. As it was unable to reach any conclusions concerning credibility, it made no further findings in this Court.

Discussion of Decision

The Hearing Committee found that Merrill's conduct was in violation of Rule 63(a), (b), and (c), and the Commission agrees. The following are the pertinent subsections of Rule 63:

(a) Recipients of Notice; Contents. Within ten days after the date of the commission or court order or judgment imposing discipline . . . , a respondent suspended . . . shall notify or cause the following persons to be notified by registered or certified mail, return receipt requested, of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same:

1. All clients being represented in pending matters; and

2. Any co-counsel in pending matters; and

3. Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties; and

4. Each court and division in which respondent has any pending matter, whether active or inactive.

The notice to be given to opposing counsel or parties shall state the place of residence of the client of respondent. In the event the client does not obtain substitute counsel before the effective date of the . . . suspension . . . , it shall be the responsibility of the . . . suspended . . . lawyer to move in the court or agency in which the proceeding is pending for leave to withdraw.

(b) Return of Client Property. Respondent shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. Respondent shall deliver all files and

records in pending matters to the client, notwithstanding any claim of an attorney lien.

(c) Effective Date of Order; Winding Up Affairs. Judgments imposing suspension or disbarment shall be effective thirty days after entry, unless the court specifies an earlier date. . . . Respondent, after entry of a judgment of disbarment or suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter of any nature. During the period between entry and the effective date respondent may wind up and complete on behalf of any client all matters that were pending on the entry date. Respondent shall refund any part of any fees paid in advance which have not been earned.

(d) Affidavit Filed With Commission and Court. Within ten days after the effective date of the judgment of disbarment or suspension . . . , respondent shall file with the commission and with the court an affidavit showing:

1. He has fully complied with the provisions of the order and with these rules;

2. All other state, federal and administrative jurisdictions in which he is admitted to practice;

3. His residence and other addresses where communications may thereafter be directed to him; and that

4. He has served a copy of such affidavit upon bar counsel.

Failure to comply with the provisions of this Rule may be punishable by contempt.

Merrill contends that the judgment and order imposing the ninety-day suspension made reference only to subsections (a) and (d) of Rule 63; therefore, he had no knowledge that he was required to comply with the entirety of Rule 63. The majority of the Commission rejects this argument. Regardless of which subsections were included in the Court's order, Merrill had a clear obligation to comply with all of Rule 63. In fact, Rule 63(d), which the Court did include in its order, provides that a suspended attorney must file an affidavit showing that he has fully complied with the provisions of the order *and with these rules.* Merrill's contention that he believed he was only obligated to comply with certain portions of the Rule is not reasonable.

Merrill has testified without dispute that he notified all existing clients of his suspension by letter, and that all of his clients expressed their wish that he continue his representation upon reinstatement. The Committee accepted this testimony, but found that there was no substitution of counsel in Merrill's cases during the period of suspension and that he did not move to withdraw from the cases. Neither did he return client files, records, or property to clients; he retained those files and records at his office and retained unearned fees in his trust and general operating accounts.

The crux of this matter is whether Merrill's actions during his suspension were appropriate. Rule 31(a)(3) provides, in part, that "no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended." However, exactly what constitutes the practice of law, and just what a suspended or disbarred lawyer can or cannot do, is not

provided in the Rules. Rule 63 provides some direction, but certainly does not address the issue of what constitutes the practice of law.

The Committee and the Commission struggled with Merrill's intent in the subject misconduct. Merrill asserts he was merely trying to do the right thing – complying with the portions of rule 63 referenced in the court's order of suspension, hiring lawyers to handle his cases while he was on suspension, etc. Despite such assertions of good will, while suspended, Merrill kept in his employ a paralegal who had a history of implying he was a lawyer; he allowed his firm, even his paralegal, to continue to accept new clients and their retainers; he continued tc supervise his non-lawyer legal staff; and he continued to be the sole signatory on his trust account and general operating bank account and he signed and issued checks on those accounts. In addition, there was no outward indication that Merrill was on suspension (for example, his office sent out pleadings and correspondence on the letterhead of "The Law Office of Fredrick D. Merrill" or "Fredrick D. Merrill, P.C.," his business cards continued to be displayed on the reception desk, telephones were answered "Law Office of Fred Merrill,"[2] and the sign on the building directory continued to read "The Law Office of Fredrick D. Merrill"). While the Rules may not specifically dictate what acts constitute the practice of law, it seems clear that such actions and circumstances are basic to the practice of law, and are inappropriate during a period of suspension.

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[2] At oral argument, Merrill stated the phones were answered only "Law Offices."

Merrill admits that he did not seek the guidance of the State Bar and did not seek an ethics opinion from the Committee on Rules of Professional Conduct in deciding what conduct would be acceptable for a suspended attorney.[3] The State Bar admits that it does not have specific guidelines as to what a suspended lawyer can, or cannot, do. As the Committee notes, the Rules Committee might well have declined such an inquiry as presenting a question of law rather than ethics. Further, the Court has not as yet had occasion to provide a clear definition of the effects of a suspension from practice. Thus, had Merrill sought guidance, it is possible he still would not have received clear parameters within which to work.

The commission, like all the parties to this proceeding, are troubled by the lack of clear direction in such circumstances. The Commission finds Rule 63 to be instructive on this issue as far as it currently goes; however, it would prefer to see the rule contain more all-encompassing and specific guidelines as to the appropriate conduct for a lawyer who is barred from practicing law.

Despite the apparent lack of a definition of the "practice of law," the Commission has concluded that, at the very least, Merrill's conduct clearly violated Rule 63(a), (b), and (c). The Commission reviewed the American Bar Association's *Standards for Imposing Lawyer Sanctions* for guidance on the appropriate sanction for such a violation. Standard 3.0, providing general factors that should be

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[3] He did seek the advice of his counsel in the former disciplinary proceedings, who advised him to retain other attorneys to handle his cases. Merrill followed this advice.

considered in fashioning the sanction warranted, lists (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. The Commission finds that Merrill's conduct violated his duty as a professional,[4] that his conduct was intentional, and that the resulting injury could have been serious – particularly had the other parties to the cases handled by Mr. Silvert withdrawn their agreements after learning he was not an attorney.

Standard 7.2, therefore, addressing Violations of Duties Owed as a Professional, is the appropriate Standard to consider in relation to Merrill's conduct. Specifically, Standard 7.2 provides for suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Merrill's conduct violated his duty as a professional to uphold the orders and rules that regulate the legal profession.

Finally, the Commission considered the applicable aggravating and mitigating factors, which it finds to be of equal weight. In aggravation are prior disciplinary offenses (in addition to the prior suspension, Merrill was

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[4] While it might appear that a violation of Rule 63 breaches a lawyer's duty to his clients, the Theoretical Framework to the *Standards* indicates that the duties lawyers have to their clients are loyalty, diligence, competence, and candor. These are not the issues raised by a violation of Rule 63. Rather, the *Standards* indicate that practicing law while suspended is a violation of the lawyer's duty as a professional, although it could obviously result in harm to a "client."

previously informally reprimanded in 1992 for unrelated conduct), a selfish motive, and substantial experience in the practice of law. In mitigation are full and free disclosure during the disciplinary proceedings, and remorse; Merrill has admitted, in hindsight, that he should have done things differently, although he could not articulate what alternate actions he might have taken.

Continuing to practice law in any form while suspended is, of course, serious conduct. Two prior cases addressing this issue are *In re Tarletz*, 165 Ariz. 243, 798 P.2d 381 (1991), and *In re Phelps*, 154 Ariz. 516, 744 P.2d 428 (1987), both of which indicate that practicing law while suspended after a previous finding of unprofessional conduct warrants disbarment. However, in both of those cases the respondents were clearly involved in the unauthorized practice of law, and each had significant prior discipline. Such is not the case here. As discussed throughout these proceedings, there is at this point no clear guideline in this state to indicate just what qualifies as "practicing law." Thus, there has been no finding that Merrill was involved in the unauthorized practice of law. The only conclusion that the Commission can reach in this matter is that Merrill violated his obligations under Rule 63. It found no prior cases addressing this particular violation, however.

Thus, in seeking guidance for the appropriate sanction in this matter, the Commission turned to consideration of the purpose of lawyer discipline, which is to protect the public and the profession, rather than to punish the offender. *In re Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986). The sanction imposed should, however, deter the respondent and other attorneys from engaging in similar

unethical conduct. *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982). As discussed at length, there can be no conclusive finding of the unauthorized practice of law in this matter. Thus, disbarment would be inappropriate and border on punitive. However, Merrill's clear violation of a court order and court rule is, in itself, serious conduct warranting a suspension.

Merrill's explanations for his conduct during his suspension are inadequate and unconvincing, and both the Commission and Committee find that his conduct was done knowingly. Based on these findings, the majority of the Commission believes a one-year suspension is warranted, as it believes it appropriate to require that Merrill prove rehabilitation before being reinstated.[5] The majority of the Commission also recommends, like the Committee, that Merrill's compliance with Rule 63, in connection with this suspension, be monitored by LOMAP personnel, as detailed above.

RESPECTFULLY SUBMITTED this 13th day of February, 1997.

/s/ Richard N. Goldsmith
Richard N. Goldsmith, Chair
Disciplinary Commission

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[5] Rule 71(h), Ariz.R.S.Ct., requires lawyers who have been suspended for more than six months to demonstrate proof of rehabilitation in a reinstatement proceeding.

Copies of the foregoing were mailed this 14th day of February, 1997, to:

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Copies of the foregoing were hand-delivered this 14th day of February, 1997, to:

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Phoenix, Arizona 85003-1742

KENDRA A. DIEGAN
Disciplinary Clerk

By: /s/ E. F. Deering

APPENDIX B

STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA FREDRICK D. MERRILL, Attorney No. 005916 Respondent.	)	Nos. 94-1394, 95-0235, and 95-0370 **COMPLAINT** (Assigned to 6D)

(Filed Nov. 27, 1995)

Complaint is made against you as follows:

GENERAL ALLEGATIONS

1. At all times relevant hereto, you were an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 13, 1979. By Supreme Court order, you were suspended from the practice of law for ninety days commencing on June 24, 1994. You were thereafter reinstated on October 6, 1994.

COUNT ONE

2. Notwithstanding this order, on or about June 24, 1994, you met with attorney Dan Durrant to discuss a loss that First Interstate Bank was likely to sustain as a result of the conduct of one of your clients.

3. Thereafter, you met with Durrant and James LeValley, Assistant General Counsel of First Interstate

Bank to discuss your clients' involvement in a check kiting scheme.

4. At that meeting you would not identify your client until you were sure that the bank would agree to negotiate a settlement of the potential loss. You also proposed a potential payment program to Durrant and LeValley.

5. At no time during the course of this meeting did you advise Durrant or LeValley that your license to practice law was suspended.

6. Thereafter, the matter was turned over to Dan Bergin, an Assistance [sic] Vice President and Counsel at First Interstate Bank. You thereafter attempted to negotiate a resolution to your clients' case. At no time did you advise Bergin that your license to practice law had been suspended.

7. Your conduct in htis [sic] regard was in violation of Rule 42, Ariz.R.S.Ct., particularly ER 5.5, and Rule 51(e), (k), and Rule 63.

COUNT TWO

8. On or about June 4, 1994, you were retained by Jerry Klock for representation in a criminal matter.

9. Shortly thereafter you learned that Mr. Klock was also a defendant in a felony from justice originating in Nevada.

10. On or about June 6, 1994, Robert Silvert contacted Scott Mitchell, an Assistant District Attorney in the Clark County District Attorney's Office, and held himself

out as Mr. Klock's Arizona attorney. Mr. Silvert thereafter negotiated a plea agreement on behalf of Mr. Klock.

11. On or about June 20, 1994, Mr. Silvert contacted David Pancoast, a Nevada attorney, and requested that he represent him at the plea agreement. During the course of this conversation, Mr. Silvert again held himself out as an Arizona attorney.

12. You failed to adequately supervise Mr. Silvert and had knowledge that he was holding himself out as an attorney.

13. By letter dated April 27, 1995, you advised the State Bar that Mr. Silvert has never held himself out as an attorney. You also provided an affidavit signed by Mr. Silvert in which he advised that he has never held himself out as an attorney.

14. Both the statements in your response and in Mr. Silvert's affidavit were false and misleading.

15. Your conduct in this regard was in violation of Rule 42, Ariz.R.S.Ct., particularly ER 5.3, ER 5.5, ER 8.1(a), and ER 8.4.

COUNT THREE

16. On July 11, 1994, and during your period of suspension, you were retained by Peter Marella for representation in a DUI matter. You were paid a retainer of $1,500.00 at that time.

17. At the time of your retention, you did not advise Mr. Marella that you had been suspended from the practice of law.

18. Thereafter, you failed to keep your client reasonably informed about the status of his matter, and failed to promptly comply with his reasonable requests for information. Although you did not appear in court with your client during the period of your suspension, your client was advised that you were busy handling other cases or were making another appearance in a different court. In addition, although your client requested that the trial in his matter be continued, neither you nor anyone on your behalf, made any application to continue your client's trial.

19. You engaged in the unauthorized practice of law, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and engaged in conduct that was prejudicial to the administration of justice. You willfully disobeyed the order of the Supreme Court placing you on suspension, and never informed your client of your suspension.

20. Your conduct as described above violated Rule 42, Ariz.R.S.Ct., particularly ER 1.2, ER 1.3, ER 1.4, ER 5.5, ER 8.4, and Rules 51(e), (k), and Rule 63(c), Ariz.R.S.Ct.

COUNT FOUR

21. You have previously been sanctioned for violations of the Rules of Professional Conduct. Specifically, in file No. 92-0485, you were suspended from the practice of law for 90 days, placed on one year's probation, and assessed the State Bar's costs on June 24, 1994, for violations of ER 1.8(a) and ER 1.15, Ariz.R.S.Ct. Additionally, in file No. 92-1136, you were informally reprimanded by order dated November 24, 1992, for violations of ER 1.15,

Ariz.R.S.Ct. The entire record in these cases may be reviewed by the hearing committee or hearing officer, with or without your consent, following a decision on the merits, pursuant to Rule 53(c) and Rule 54(k)(4), Ariz.R.S.Ct.

DATED this 27th day of November, 1995.

/s/ Yigael M. Cohen
Yigael M. Cohen
Bar Counsel

Original filed with the
Disciplinary Clerk of the
State Bar of Arizona, this
27th day of November,
1995,

By: /s/ Cassi Taylor